Supreme Court, U.S.
FILED

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NO.

In The

SUPREME COURT OF THE UNITED STATES

DARYL KEITH SEWELL,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent,

On Petition for a Writ of Certiorari to The Michigan Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

TUCKER & HUGHES, P.C.
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48 pp

QUESTIONS PRESENTED FOR REVIEW

Did misconduct of a juror and the court's failure to purge the jury taint deprive Petitioner of a fair trial?

Were Petitioner's Fifth Amendment Rights violated when the prosecuting attorney commented upon Petitioner's failure to testify?

Did Petitioner's trial attorneys provide ineffective assistance of counsel by failing to request that the trial court deviate from the sentencing guidelines?

Did Petitioner's trial attorneys provide ineffective assistance of counsel by failing to move for judgment notwithstanding the verdict following jury deliberations?

Did Petitioner's initial appellate attorneys provide ineffective assistance of counsel by failing to follow the court rules regarding appellate procedure?

PARTIES TO THE PROCEEDINGS

Petitioner, Daryl Keith Sewell, was the Defendant in The Wayne County Circuit Court (Criminal Division) and Defendant-Appellant in The Michigan Court of Appeals and Defendant-Appellant in The Michigan Supreme Court.

Respondent, The People of the State of Michigan was the Plaintiff in The Wayne County Circuit Court (Criminal Division) and Plaintiff-Appellee in The Michigan Court of Appeals and Plaintiff-Appellee in The Michigan Supreme Court.

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OPINIONS BELOW

On September 28, 1999, the Michigan Supreme Court issued its Order (No: 111833) denying Petitioner's Application for Leave to Appeal. On March 9, 1998, the Michigan Court of Appeals issued an Order (No: 203562) denying Petitioner's Application for Leave to Appeal.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Michigan Supreme Court and its judgment of September 28, 1999. The judgment affirmed the lower court's judgment entered on March 9, 1998. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. @1254(1).

STATUTES INVOLVED

M.C.L. @333.7401

Unlawful manufacture, delivery, or possession with intent to manufacture or deliver; unlawful dispensing, prescription or administration; penalties

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

@750.227

Concealed weapons, carrying

(1) A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument or any length, or any other dangerous weapon, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person.

(2) A person shall not carry a pistol concealed on or about his or her person or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

(3) A person who violated this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00.

STATEMENT OF THE CASE

This case originated in the first instance in the Wayne County Circuit Court (Criminal Division), Case No: 92-001153, by The People of the State of Michigan.

The action in the Wayne County Court (Criminal Division) was initiated due to Petitioner being indicted for possession with intent to deliver 225 grams but less than 650 grams of cocaine and possession of a felony firearm pursuant to MSA @14.15(7401), MCL @333.7401 and MSA @28.424, MCL @750.227b, respectively.

Petitioner was arrested on December 18, 1991 as a result of surveillance of the residence located at 19446 Fenmore in Detroit, Michigan. Petitioner as well as two other black males arrived at the same residence at approximately the same time. There was testimony that Petitioner was found near a dining room table in the residence where a car mitt containing sealed packages of suspected cocaine was found. After executing the search warrant at the 19446 Fenmore address, the police then executed a search warrant at Petitioner's home located at 19710 Lindsay and found no drugs or illegal contraband.

During the trial the state produced expert testimony that none of Petitioner's finger prints were found on any of the seized evidence. There was no evidence produced at trial: (1) proving that Petitioner exercised control of the drugs found at 19446 Fenmore; nor (2) proving that Petitioner had ever handled the mitt of drugs. Moreover, not only were no drugs were found on Petitioner's person, but the surveillance did not show Petitioner participating in any drug transactions at either address.

At trial, the court stated: "[t]he concern I have quite frankly, is that there's been . . . there's been no evidence brought forth to the Court which would indicate the defendant in any way, other than being by the drug itself, exercised any control over the drugs." The Court's concerns were justified because case law clearly provides that a person cannot be convicted of possession of contraband by mere association with the narcotics. *People v. Davenport,* 30 Mich App 252, 197 NW2d 521 (1972)

On the third day of trial, just prior to jury deliberations, the prosecutor notified the Court that his secretary and/or administrative assistant had received a phone call that morning from someone purporting to be a juror in Petitioner's trial and later matched the voice on the phone with an actual juror. The secretary testified that the purported juror had stated that "Angela had been paid off." Because the juror list contained a juror named Angela Hill, the Court randomly questioned each juror to see whether they had been influenced unduly by a juror named "Angela" or any other outside forces. Defense counsel objected to the voir dire and requested a mistrial because of jury tampering and because the form of the voir dire constituted juror intimidation, thus the jury lost its ability to deliberate fairly and impartially.

Petitioner was ultimately convicted of the above stated charges and was sentenced on November 10, 1992. Petitioner had retained counsel other than Counsel of Record to represent him at trial and during the initial appeal process. The first Brief on Appeal was filed untimely, Case No: 160019, resulting in its involuntary dismissal on June 8, 1994. An untimely Motion for Rehearing & Reconsideration was filed on September 23, 1994 and was denied on October 31, 1994. Prior counsel proceeded to file an Application for Leave to Appeal to the Michigan Supreme Court, Case No: 101431, on November 21, 1994, which was subsequently denied on July 18, 1995.

Petitioner sought Counsel of Record to take over the matter in order to seek relief. A Motion for Relief from Judgment was filed April 4, 1997 in the Wayne County Circuit Court (Criminal Division) and was denied on May 6, 1997. Petitioner filed an Application for Leave to Appeal to the Michigan Court of Appeals from the May 6, 1997 judgment denying Petitioner's Motion for Relief from Judgment. The Michigan Court of Appeals entered an Order denying Petitioner's Application for Leave to Appeal on March 9, 1998. An Application for Leave to Appeal was subsequently filed with the Michigan Supreme Court and was denied on September 28, 1999. Petitioner filed a Motion for Extension of Time to File this Petition for a Writ of Certiorari on December 16, 1999 and said Motion was granted on or about December 28, 1999.

The federal questions sought to be reviewed were initially raised during the proceedings in the Wayne County Circuit Court (Criminal Division) when Petitioner's Motion for Relief from Judgment was filed. The same federal questions were raised in the Michigan Court of Appeals and the Michigan Supreme Court in the form of constitutional issues relative to the Fifth Amendment, ineffective assistance of counsel, Petitioner's right to fair trial and Petitioner's right to an impartial jury.

Petitioner now files this timely Petition for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS OR OF THE U.S. SUPREME COURT INVOLVING AN INDIVIDUAL'S FIFTH AND SIXTH AMENDMENT RIGHTS

I.

Relative to the first issue regarding Petitioner's inability to receive a fair trial due to the trial court's failure to either purge the source of the taint on the jury or declare a mistrial, the Michigan Supreme Court has held:

> "The presumption is always in favor of good character, but the law concerning juries provides strictly that all jurors shall be secluded from outside influence, and presumes that such influence may act upon some of them and may act so as to be beyond detection. Human nature is no different in jurors than in others, and men are not always conscious of how far they are in fact biased. And their inward sentiments cannot be ascertained." *Churchill v. Alpena Circuit Judge*, 56 Mich 536, 23 NW 211 (1885); *People v. Harris*, 43 Mich App 146, 204 NW2d 734 (1972)

When it is apparent that questioning the jurors individually will not purge the taint, it was incumbent upon the trial Court to exercise its discretion by discharging juror(s) who were the source of the improper influence or by declaring a mistrial. *People v. Dalton,* 83 Mich App 725, 269 NW2d 280 (1978)

Petitioner further maintains that certain jurors should have been discharged or a mistrial should have been declared. Michigan Supreme Court case law provides that if the issue of a tainted jury is brought to the attention of the Court wherein a juror is intending to convict or acquit the accused despite the evidence, it is the court's duty to declare a mistrial. *People v. Bigge,* 297 Mich 58, 297 NW 70 (1941)

It is Petitioner's assertion that the trial Court's failure to declare a mistrial and its inquiry of the individual jurors regarding the anonymous phone call were insufficient to guarantee Petitioner's right to a fair and impartial jury.

II.

Relative to the second issue of Petitioner's Fifth Amendment rights being violated because of the prosecutor's comments made during closing argument to the jury about Petitioner not testifying at trial, the following excerpt from the record of the prosecuting attorney's closing argument is compelling:

> "Now what am I specifically referring to? Mr. Burkett had an opportunity to address you in opening statement and he said to you a number of things. Okay? He said to you first the Defendant didn't live there. **Now, if you were assuming that Defendant was going to get on the stand, he didn't**, therefore,

that's not evidence. If you get that from other evidence that was given that he didn't live there, that's up to you . . . "

"You were told by Mr. Burkett why the Defendant went there [Fenmore address]. The only way you could know that is from the mind of the person that went there. He doesn't have to testify, you cannot hold that against him. But don't assume because Mr. Burkett says why he went there that's true because **he never got up there and told you that**." *Trial Transcript, Vol. III, pg. 31-32 (emphasis added)*

Once said comments were made by the prosecutor, the record was preserved by objections being made by defense counsel. This Court has clearly held that comments to the jury by a prosecutor in a state criminal trial upon defendant's failure to testify as to matters which said defendant can reasonably be expected to deny or explain violates the self incrimination clause of the Fifth Amendment. *Griffin v. California,* 380 U.S. 609 (1965)

Consequently, the trial Court committed reversible error in the instant case by not granting Petitioner a mistrial in light of the prejudicial circumstances which transpired during the prosecution's closing argument.

III.

Relative to the third, fourth and fifth issues regarding the issue of ineffective assistance of counsel by Petitioner's trial attorney and initial appellate attorney, Petitioner cites to U.S. Supreme Court precedent holding that a claim for ineffective assistance of counsel requires a showing that "counsel's performance was deficient" and a showing that "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668 (1984) Moreover, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Petitioner maintains that as a result of the circumstances detailed below, there is a reasonable likelihood that the outcome of this matter at the trial and previous appellate levels would have been different. *See, People v. LaVearn,* 448 Mich 207, 528 NW2d 721 (1995)

(1) defense counsel failed to request that the trial court deviate from the sentencing guidelines in light of the mitigating circumstances; *People v. Milbourn,* 435 Mich 630, 461 NW2d 1 (1990); *People v. Coles,* 417 Mich 523, 339 NW2d 440 (1983);

(2) defense counsel failed to move for judgment notwithstanding the verdict following jury deliberations when there was clearly insufficient evidence to create a jury question. *Clemons v. Leswek,* 200 Mich App 456, 505 NW2d 283 (1993); and

(3) defense counsel failed to timely draft and file Petitioner's initial brief with the Michigan Court of Appeals which resulted in the involuntary dismissal of this matter and a negative impact upon the appellate process in this matter.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TUCKER & HUGHES, P.C.

s/ Clarence B. Tucker
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APPENDIX A — LETTER GRANTING PETITIONER'S MOTION FOR AN EXTENSION OF TIME TO FILE WRIT OF CERTIORARI FROM THE U.S. SUPREME COURT DATED DECEMBER 28, 1999

December 28, 1999

Mr. Clarence B. Tucker
615 Griswold
Suite 920
Detroit, MI 48226

Re: Daryl Keith Sewell
v. Michigan
Application No: 99A533

Dear Mr. Tucker:

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice Stevens, who on December 28, 1999, extended the time to and including February 25, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By: s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

APPENDIX B -- ORDER DENYING PETITIONER'S APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN SUPREME COURT, DATED SEPTEMBER 28, 1999

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

Case No: 111833

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DARYL KEITH SEWELL,

Defendant-Appellant

ORDER

BEFORE CAVANAGH and KELLY, JJ., would remand to the Court of Appeals as on leave granted

By order dated March 9, 1999, this Court directed the prosecutor to file a response to defendant's application for leave to appeal, and prosecutor's response has been received. On order of the Court, the application for leave to appeal the March 9, 1998 decision of the Court of appeals is again considered, and it is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Appendix B

ENTERED BY ORDER OF THE COURT
s/ Corbin R. Davis
Corbin R. Davis, Clerk

APPENDIX C -- ORDER DIRECTING THE PROSECUTOR TO FILE A MORE SPECIFIC RESPONSE TO PETITIONER'S APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN SUPREME COURT, DATED MARCH 9, 1999

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

Case No: 111833

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DARYL KEITH SEWELL,

Defendant-Appellant

ORDER

On order of the Court, the application for leave to appeal is considered. We DIRECT the prosecutor to file a response to the application, within 28 days of the date of this order with particular emphasis on the defendant's contention that he has shown "cause and prejudice" with regard to his claim of ineffective assistance of appellate counsel and on defendant's contention that the prosecutor improperly commented on his failure to testify.

Appendix C

ENTERED BY ORDER OF THE COURT
s/ Corbin R. Davis
Corbin R. Davis, Clerk

APPENDIX D - ORDER DENYING PETITIONER'S APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN COURT OF APPEALS, DATED MARCH 9, 1998

STATE OF MICHIGAN
COURT OF APPEALS

Case No: 203562

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DARYL KEITH SEWELL,

Defendant-Appellant

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

ENTERED BY ORDER OF THE COURT
s/ Carl L. Gromek
Carl L. Gromek, Chief Clerk

APPENDIX E -- ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE TRANSCRIPTS FROM THE MICHIGAN COURT OF APPEALS, DATED NOVEMBER 21, 1997

STATE OF MICHIGAN
COURT OF APPEALS

Case No: 203562

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DARYL KEITH SEWELL,

Defendant-Appellant

ORDER

The Court orders that the motion for extension of time to file the transcripts is GRANTED. The court reporter shall have until September 17, 1997 in which to file the transcripts.

ENTERED BY ORDER OF THE COURT
s/ Ella Williams
Ella Williams, Chief Clerk

APPENDIX F -- ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT FROM THE WAYNE COUNTY CIRCUIT COURT (CRIMINAL DIVISION), DATED MAY 6, 1997

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT
CRIMINAL DIVISION

Case No: 92-001153-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

DARYL KEITH SEWELL,

Defendant.

ORDER

A Motion for Relief from Judgement having been filed; and the People having filed an answer in opposition; and the court having reviewed the brief and records in this cause and being fully advised in the premises.

IT IS ORDERED THAT the Motion for Relief from Judgment be and is hereby denied.

Appendix F

ENTERED BY ORDER OF THE COURT
s/ Isidore Torres
Isidore Torres
Wayne County Circuit Court
(Criminal Division) Judge

APPENDIX G -- ORDER OF CONVICTION AND SENTENCE FROM THE WAYNE COUNTY CIRCUIT COURT (CRIMINAL DIVISION), DATED NOVEMBER 10, 1992

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT
CRIMINAL DIVISION

Case No: 92-001153-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

DARYL KEITH SEWELL,

Defendant.

ORDER

THE COURT FINDS The defendant, represented by counsel, was found guilty on November 10, 1992 of the crimes stated below:

(1) possession with intent to deliver 225 grams but less than 650 grams of cocaine (MSA @14.15(7401), MCL @333.7401); and

(2) possession of a felony firearm (MSA @28.424, MCL @750.227b)

IT IS ORDERED THAT Defendant is sentenced to custody of Michigan Department of Corrections for a minimum statutory period of 20 years to a maximum statutory sentence 30 years.

ENTERED BY ORDER OF THE COURT
s/ Isidore Torres
Isidore Torres
Wayne County Circuit Court
(Criminal Division) Judge

APPENDIX H — FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX I — SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX J -- EXCERPT FROM PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL DATED, APRIL 1, 1999

STATE OF MICHIGAN
COURT OF APPEALS

Case No: 203562

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DARYL KEITH SEWELL,

Defendant-Appellant

* * * * *

Law and Analysis

The defendant claims the prosecutor made an improper comment on his failure to testify. It is settled that a prosecutor is not permitted to comment on a defendant's failure to testify since it is an important corollary to the 5th Amendment right against self-incrimination. *Griffin v. California*, 380 US 609; 85 S Ct 1229; --L Ed 2d — (1965); *People v. Brownridge*, 225 Mich App 291 (1997); *People v. Guenther*, 188 Mich App 174 (1991)

Appendix J

The state of the law in Michigan, as stated in case law, court rule and jury instruction, generally holds that evidence in a trial comes in four forms; direct evidence which comes from the witnesses who testify at trial, physical evidence, demonstrative evidence, and circumstantial evidence. Clearly, evidence does not comprise of lawyers' opening statements, questions presented to witnesses, nor closing arguments.

In his opening argument, defense counsel properly asserted to the jury the following propositions:

> "Nothing that I'm going to say is evidence. But I'm going to ask you to hold both of us to what we say in our case. See if what we said we're going to do and whether or not we're going to do it. And if we don't do it, ask yourselves why did they say they were going to do these things and then not do it?"

Further, it is settled that a party can argue to the jury that the opponent failed to fulfill its prophecy (or theory of case) as set forth in opening statement. In other words, if a party indicates to the jury in opening statement that he will present particular evidence in support of his case and he thereafter fails to do so, the opposition can comment on such failure during closing argument which would *not* amount to improperly shifting the burden of proof. *People v. Balog*, 56 Mich App 624 (1974); *People v. Burd*, 39 Mich App 22 (1972). During his opening statement, defendant informed the jury of the following theory.

> "Now, why was Daryl Sewell in this dope house? Because the police did find dope there. The evidence will show you that this home belongs to Daryl's sister. Daryl Sewell's sister and her boyfriend. We'll bring in evidence to show you that. **We will also bring in evidence to show you that on this particular day, when he got off from work, his sister told him -- and you will hear from the witness stand -- I am having a furnace put in my home. Will you come over there, because I have to go to work, and sit with the furnace man. He gets to the house around four o'clock when he gets off from work,** and sits in that house while the furnace man -- and let the furnace man in, and let someone else in. Shortly thereafter, an hour or so, the police raid the house because it is uncontradicted that the sister's boyfriend who she stays there with is a dope dealer. * * * ." (Emphasis added)

The witnesses at trial did not present any such information to the jury in support of defendant's theory as set forth above. The defendant presented one witness, Raymond Spearman, who was the furnace man whose testimony did not support defendant's theory (especially that in bold-face above). As a matter of fact, the above-raised theory, which was used by defendant to garner an advantage for his case early in the proceedings, was never brought to fruition. Consequently, the prosecution had the right to

comment on the fact that the defense did not fulfill it's theory. If the prosecution is not allowed to balance the scales by challenging the defense's unfulfilled theory during closing argument, an unfair advantage would be obtained by the defense. In other words, the defense would be able to throw anything on the wall to see what sticks and would freely dance from the responsibilities of his comments without justification., As a result, the Courts allow the parties to comment on the opponent's failure to submit evidence supporting their theory, *Balog, supra; Burd, supra.*

In response to defendant's failure to fulfill the theory of his case, via testimony of the witnesses, the prosecution reiterated during closing argument that although the lawyer's comments are not evidence, the defendant failed to show what it said it would. The prosecutor said:

> "When the prosecution presents its case, you can then go into that jury room with the case in hand, and say what do these facts show with respect to the elements of the offense charged? And yes, they show the elements of the offense charged. Therefore you can render a verdict of guilty. **You don't have to hear from the defense at all. That's why the Judge tells you at the start of the case, the defense doesn't have to testify.** But if the defense cares to call any witness, you may consider those witnesses. Okay.

* * * * *

"Those rulings are made by the Judge. Okay? In other words the Judge steers the direction of the case in terms of the decorum of the courtroom and what is permissible and what isn't permissible as evidence in the case. Okay. "In keeping with that, nothing that Mr. Burkett has said in this case is evidence And we can't go ahead and bring into court things that have no relevance under the law. Now, what am I specifically referring to? Mr. Burkett had an opportunity to address you in opening statement, and he said to you a number of things. Okay? He said to you first that Defendant didn't live there.

"Now, if you were assuming the Defendant was going to get on the stand, he didn't, therefore that's not evidence. If you get that from other evidence that was given that he didn't live there, that's up to you.

"He said the Defendant was not arrested and convicted of any crime. You don't know that. You don't know that. We're not allowed to go into that at all. That's not evidence. Now, why he said that I don't know, but its' not evidence. And I want to clarify that for you because I don't want you to go into that jury room and assume because Mr. Burkett says something, it's true. That's why the

Court tells you what we say is not evidence. You have to get from the witness. There's absolutely no evidence of that in this case. We're not permitted to address that at this point other than to say what I said. Period. "You were told by Mr. Burkett why the Defendant went there. The only way you could know that is from the mind of the person that went there. **He doesn't have to testify. You cannot hold that against him.** But don't assume because Mr. Burkett says why he went there and told you that.

* * * * *

"You heard in opening statement by Mr. Burkett — and it is not evidence in this case, and that's why I keep saying it. It is not evidence in this case and you're not to at all consider it because you don't know that it's true or not. In fact, you know, it could be an outright misstatement. You don't know.

"That the Defendant had gotten off of work; you don't know that. You don't know whether he works at all. Now, why does he say that to you in opening statement? For any reason he likes. He can change his strategy in midstream. That's up to him. But the point is it's not evidence in this case,

> and I ask you not to take those things into account because you'd be doing a disservice to everybody. You'd be doing precisely what you're not allowed to do."

After arguments were heard, the defendant orally moved for a mistrial based on the above argument as stated by the prosecutor. The trial court found the argument proper and denied defendant's motion. (10/27/92, pp).

Although the defendant argues that the "Appellee's comments about Appellant's failure to take the stand were geared toward planting in the minds of the jury that Appellant had some sinister or criminal purpose from being present at the Fenmore address at the time of the raid," this argument exaggerates the prosecutor's comments. First, the prosecutor's theory of the case was that this defendant had possessed this large amount of cocaine while sitting at the table where it was found. Hence, this "sinister or criminal purpose" was borne by the defendant: his intention to deliver large amount of cocaine This argument, while it may be zealous, it is perfectly proper. Second, the prosecutor did not formulate this aspect of his argument to plant a seed in the jury's mind that the defendant didn't take the stand because he was hiding something and thus improperly shifting the burden of proof to the defense, but rather was merely attempting to properly ensure that the jury doesn't consider defense counsel's comments as evidence and pointedly reiterated that the defense's theory of the case was not believable. During this assault on the defense's case, the prosecutor carefully repeated that the jury did not "have to hear from the defense at all," "the defense doesn't have to testify,"

and that the "[defendant} doesn't have to testify. You cannot hold that against him." (10/27/92, pp. 29-31) The prosecutor did not argue to the jury that the defendant's silence is evidence of guilty, rather his point was the that defense counsel's statements are not evidence.

It must be highlighted that the Court in *Griffin, supra,* while holding a prosecutor may not comment on a defendant's failure to testify, specifically concluded:

> "We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court **that such silence is evidence of guilt.** (Emphasis added)

The Michigan Court of Appeals also addressed this issue in *Guenther, supra,* and indicated that the court applies a balancing test and considers the nature of the prosecutor's statements along with the number made. The court held:

> "In weighing the nature of the comments, the court looks at the comments in the context in which they were made and determines '[w]hether the language used was manifestly

> intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Guenther* at 179

Thus the question is whether the language used by the prosecutor was intentionally designed to necessarily cause the jury to conclude that such comment was a remark on the defendant's silence which was evidence of guilt.

Here, reviewing the comments of the prosecutor in the context they were made, it is clear that they were not manifestly intended to be or were of such a character that the jury necessarily took them to be a comment on the failure of defendant to testify. Again, the prosecutor was not only ensuring that the jury only consider testimony as evidence of the trial and not attorney comments, but also he repeatedly informed the jury that the defendant has the right not to testify and that cannot be held against him. Consequently, the prosecutor's remarks do not amount to an improper reference to defendant's failure to testify. Defendant's claim must fail.

* * * * *

Law and Analysis

The defendant makes three claims that of error resulted due to the ineffective assistance of counsel; (A) trial counsel should have requested the sentencing court to deviate from the guidelines by citing mitigating circumstances; (B) trial counsel's failure to

move for JNOV based upon the insufficiency of the evidence caused prejudice to the defendant; (C) appellant counsel was ineffective for failure to timely draft and file his claim on appeal.

Generally, effective assistance of counsel is presumed and defendant carries a heavy burden in proving that his trial counsel's representation was otherwise. *People v. Eloby,* 215 Mich App 472 (1976); *People v. Wilson,* 180 Mich App 12, 17 (1989); *People v. Newton, (After Remand),* 179 Mich App 484 (1989). In order to overcome the presumption of sound trial strategy, pursuant to *Pickens, supra* at 338, the defendant must show the following:

> " . . . That counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial."

The Court defined "prejudice" as:

> "To find prejudice, a Court must conclude that there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 312

Hence, the defendant must ultimately show he was prejudiced by counsel's performance. The appellant submits that there exists as many different types of strategy as there are lawyers and cases. Th court in *Mitchell, supra,* recognized this phenomenon in stating:

> "Lawyers will inevitably make errors in the process, but, because both cases and attorneys come in an infinite variety of configurations, those errors can only rarely be defined 'with sufficient precision to inform defense attorneys correctly just what conduct to avoid.' *Strickland,* at 693, 104 S Ct at 2067. Thus, the Sixth Amendment guarantees a range or reasonably competent advice and a reliable result. It does not guarantee infallible counsel." *Id.* At 170-171

Thus, counsel is not required to supply defendant with perfect representation; mistakes may be made. Rather, what is required is representation that is reasonable as defined in *Pickens.* It must be noted that even sound trial strategy that eventually fails is not ineffective assistance of counsel. *People v. Burt,* 220 Mich App 1 (1996). Further, it is well settled that on appeal this Court will not second-guess defense counsel's strategy nor substitute its judgment for that of trial counsel in matters of trial strategy. *People v. Barnett,* 163 Mich App 331, 338 (1987); *People v. Lotter,* 103 Mich App 386, 390-391 (1981)

A.

First, defendant claims his counsel was ineffective at sentencing. While a defendant is entitled to the effective assistance of counsel at sentencing, the decision to address the court at sentencing is a tactical one which should not be disturbed on appeal if there is not a showing of "a total failure to advocate" a defendant's position. *People v. Harris,*

185 Mich App 100 (1990); *People v. Hughes*, 165 Mich App 548, 550 (1987).

Moreover, the Fifth Circuit addressed the standard for ineffective assistance of counsel at sentencing which appears would also apply in Michigan. In *Spriggs v. Collins*, 933 F2d 85 (CA 5, 1993), the court held that the defendant must show that but for trial counsel's errors, there is a reasonable probability that the prison sentence imposed would have been significantly less. Defendant, herein, has made no such showing. First, defendant was convicted of a crime that carries a mandatory sentence of 20-30 years and thus the principle of proportionality was violated since such sentence is mandated by the Legislature, except when a defendant can exhibit substantial and compelling reasons to deviate from the mandatory sentence. The reasons to deviate, as cited by defendant, are inadequate to support his conclusions. Defendant contends that because he has no prior convictions, that there was a "weak nexus" between the drugs and defendant, that "[he] has not demonstrated that he is a danger to society." (Defendant's brief, p. 11), and that the court cannot use his as an example to deter others from committing like offenses.

Clearly, the sentencing court properly sentenced defendant to the mandatory sentence. Contrary to defendant's argument, the sentencing court may sentence the defendant to a term that would deter others from committing like offenses. Further, the society must be protected from narcotics and those whom partake in the

sale of, or intend to sell, such controlled substances. The defendant has failed to exhibit any compelling reasons why he should receive a sentence below the Legislatively-enacted mandatory minimum. Defendant's claim must fail.

B.

Second, defendant claims that since the evidence was insufficient to go to the jury on the charged crimes, trial counsel was ineffective for failing to move for a JNOV. The standard of review is *de novo. People v. Wolfe,* 440 Mich 508 (1992). On appeal this Court will not reverse a criminal conviction unless it is satisfied that there was error committed which resulted in a miscarriage of justice. *People v. Reed,* 17 Mich App 696 (1969).

Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in concluding that defendant is guilty beyond a reasonable doubt. U.S.C.A. Const. Amend. 14, *People v. Sealy,* 136 Mich App 168 (1984)

In addressing an insufficiency of the evidence claim, the reviewing court must apply the standard set forth in *People v. Hampton,* 407 Mich 354 (1979), *reh den* 407 Mich 1164 (1980), *cert den* 449 U.S. 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). The court in *Wolfe, supra* at 514-515, explains the *Hampton* standard in stating:

> "In short, when determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in

> the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Hampton, supra,* 407 Mich 368; *Petrella, supra,* 424 Mich 268

This standard of reviewing sufficiency of evidence questions is applicable to both jury and bench trials. *People v. Petrella,* 424 Mich 221 (1985)

It is well settled that the prosecution must only prove its own case beyond a reasonable doubt. This court in *People v. Hopson,* 178 Mich App 406 (1989), stated:

> "The evidence is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide *People v. Daniels,* 163 Mich App 703; 415 NW 2d 282 (1987), *lv den* 430 Mich 854 (1988), and cases cited therein."

In any case wherein a defendant challenges the sufficiency of the evidence used to convict him of a crime this court should consider only whether the prosecution's case was proven beyond a reasonable doubt. Even under situations where a defendant denounces the evidence submitted by the prosecution and advances evidence contrary to that of the prosecution's, the prosecution is not required to negate every reasonable theory the defense presents

to the trier of fact. Nor is the trier of fact required to accept testimony as true. The trier of fact is to decide who to believe and what testimony of a particular witness to believe. *People v. Bower,* 108 Mich App 517 (1981).

Defendant was charged with possession with intent to deliver cocaine in an amount of 225 grams to 650 grams pursuant to MCL 333.7401(1), (2)(a)(ii). Defendant specifically contends that the prosecution failed to prove that he was in possession of the cocaine that was found on the table where only the defendant was seated.

The "possession" of something connotes dominion or right of control with knowledge of its presence which includes both actual and constructive possession. *People v. Mumford,* 60 Mich App 279 (1975). Constructive possession turns on whether the defendant has dominion or control over the controlled substances; the defendant must have the right or recognized authority to possess them. *People v. Konrad,* 449 Mich 263 (1995)

Clearly, the testimony offered by the prosecution supports the conviction. Viewing the evidence in the most favorable light, the defendant possessed the narcotics as he had the only key to the premises of the three people in the house, he had a gun in his waistband, carried a pager and cellular telephone, and was sitting right in front of the dope which was on the table. (10/26/92, pp 31-125). Defendant's claim must fail as his trial counsel provided the effective assistance of counsel.

C.

Next, defendant contends that his appellate counsel was ineffective for failing to timely draft and file a claim of appeal.

First, defendant does not warrant his claim. He only [boldly] asserts that such behavior, or lack thereof, results in the ineffective assistance of counsel. In *Mitcham v. City of Detroit,* 355 Mich 182 (1959), this Court held:

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump only then does the appellate well begin to flow." *Id.* at 203

Appellee submits that the defendant has failed to cite authority supporting his position that he was prejudiced and has consequently faltered to "prime the pump" leaving to this Court the responsibility to rationalize this aspect of his claim. This court should reject defendant's argument.

Even if this Court decides to review this matter notwithstanding defendant's failure to properly cite authority in support of his position, the appellee submits that his claim must fail.

It is well settled that effective assistance of appellate counsel does not require counsel to raise every arguably meritorious issue on appeal. *People v. Reed,* 449 Mich 375 (1995); *Jones v. Barnes,* 463 US 745; 103 S Ct 3308; 77 L Ed 987 (1983). The Court reasoned that counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review, and, in this respect, specifically stated that "a brief that raises every colorable issue runs the risk burying good argument . . . . " 463 US at 753. See, further *Smith v. Murray,* 477 US 527; 106 S Ct 2661; 91 L Ed 2d 434 (1986), wherein the Court stated that "this process of 'winnowing our weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.' Also, in *Miller v. Keeney,* 882 F 2d 1428, 1434-1435 (CA 9, 1989), it was held that:

> "In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weak issues is widely recognized as one of the hallmarks of effective appellant advocacy. * * * Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts

> from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. For these reasons, a lawyer who throws in every arguable point -- 'just in case' -- is likely to serve her client less effectively than one who concentrates solely on the strong arguments. Appellant counsel will therefore frequently remain above an objective standard of competence (prong one [Strickland]) and have caused her client no prejudice (prong two) for the same reasons — because she declined to raise a weak issue. Such is the case here."

Although it is lucid that appellate counsel in the case at bench failed to timely file a brief on appeal of right rather than failing to raise an issue on appeal, defendant's claim must fail. Because appellate counsel failed to file a brief on his behalf raising the aforementioned issues in this appeal (as argued *ante*), defendant argues he was prejudiced since said raised issues would have caused a different outcome.

Under circumstances when a defendant files a brief on appeal of right, MCR 7.204 is the vehicle used to have a matter heard in the Court of Appeals, and the Court does not have the discretion *not* to hear the matter. If a defendant fails to file a brief on appeal of right, MCR 7.205 governs wherein the defendant files an application for leave to appeal. Under MCR 7.205, the Court is not required to hear the matter but rather has the option to choose whether to review the matter on the merits or simply deny it summarily without reviewing the merits of the appeal.

Appendix J

In the case at bench, the defendant filed his application for leave to appeal with the Court of Appeals which denied defendant's appeal "*for lack of merit in the grounds presented.*" Hence, although the Court was not required to review the application on the merits, it did so and ultimately denied defendant's appeal *on the merits.*

Hence, applying the *Pickens* standard of ineffective assistance of counsel to the case at bench, although appellate "counsel's performance fell below an objective standard of reasonableness" for failing to timely file a brief on appeal of right and thus establishing the first prong of *Pickens,* clearly defendant cannot successfully contend that "the representation so prejudiced the defendant as to deprive him of a fair trial." Even though appellate counsel committed a *faux pas* by failing to timely file the appeal, ultimately, the merits of defendant's appeal were heard by the Court of Appeals, albeit by application rather than by right. Because the Court heard defendant's arguments *on the merits* of his claim, he did not suffer prejudice. The defendant has not established that "there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Pickens, supra.* As argued *ante,* defendant's claims are without merit. Consequently, his application for leave must be denied.